(51)

UNITED NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.496
13 July 1994

ENGLISH
Original: ENGLISH/FRENCH

INTERNATIONAL LAW COMMISSION
Forty-sixth session
Geneva, 2 May - 24 July 1994

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

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CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

1. The General Assembly, in resolution 177 (II) of 21 November 1947, directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; and (b) prepare a draft Code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

2. On the basis of the reports of the Special Rapporteur, the Commission: (a) at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of offences against the peace and security of mankind, with commentaries, to the General Assembly. 1/

3. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of offences against the peace and security of mankind as formulated by the Commission raised problems closely related to those of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee had submitted its report.

4. On the basis of the recommendations of the Special Committee, the General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted the Definition of Aggression by consensus.

5. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of offences against the peace and security of mankind and to examine it with the

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1/ Yearbook ... 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Yearbook ... 1985, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. 2/

6. The Commission, at its thirty-fourth session, in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. 3/ The Commission, from its thirty-fifth session, in 1983, to its forty-third session, in 1991, received nine reports from the Special Rapporteur. 4/

7. At its forty-third session, in 1991, the Commission provisionally adopted on first reading the draft articles of the draft Code of crimes against the peace and security of mankind. 5/ At the same session, the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations be submitted to the Secretary-General by 1 January 1993. 6/ The Commission noted: that the draft it had completed on first reading constituted the first part of the Commission's work on the topic of the draft Code of Crimes against the Peace and

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2/ In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English to read "Draft Code of Crimes against the Peace and Security of Mankind".

3/ For a detailed discussion of the historical background of this topic, see the Report of the International Law Commission on the work of its thirty-fifth session (Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10, (A/38/10)) paras. 26 to 41.

4/ Yearbook ... 1983, vol. II (Part One), p. 137, document A/CN.4/364; Yearbook ... 1984, vol. II (Part One), p. 89, document A/CN.4/377; Yearbook ... 1985, vol. II (Part One), document A/CN.4/387; Yearbook ... 1986, vol. II, document A/CN.4/398; Yearbook ... 1987, vol. II (Part One), document A/CN.4/404; Yearbook ... 1988, vol. II (Part One), document A/CN.4/411; Yearbook ... 1989, vol. II (Part One), document A/CN.4/419 and Add.1 and Corr.1 and 2 (Spanish only); Yearbook ... 1990, vol. II (Part One), document A/CN.4/430 and Add.1; Yearbook ... 1991, vol. II (Part One), document A/CN.4/435 and Add.1 and Corr.1.

5/ See Official Records of the General Assembly, Forty-sixth session, Supplement No. 10 (A/46/10), para. 173.

6/ Ibid., para. 174.

Security of Mankind; and that the Commission would continue at forthcoming sessions to fulfil the mandate the General Assembly had assigned to it in paragraph 3 of resolution 45/41, of 28 November 1990, which invited the Commission, in its work on the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. 7/

8. At its forty-sixth session the General Assembly in its resolution 46/54 of 9 December 1991 invited the Commission, within the framework of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in the Commission's report on the work of its forty-third session (1991) 8/ concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism, in order to enable the General Assembly to provide guidance on the matter.

9. At its forty-fourth session, in 1992, the Commission had before it the Special Rapporteur's tenth report on the topic (A/CN.4/442), which was entirely devoted to the question of the possible establishment of an international criminal jurisdiction. After considering the Special Rapporteur's report, the Commission decided to set up a Working Group to consider further and analyse the main issues raised in the Commission's report on the work of its forty-second session in 1990 concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international court or other international criminal trial mechanism. In so doing, the Working Group would take into account the issues raised by the Special Rapporteur in his ninth report (Part II) (A/CN.4/435 and Add.1 and Corr.1) and in his tenth report, in the light of the discussions thereon at the Commission's past and current

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7/ Ibid., para. 175. The Commission noted that it had already started to discharge this mandate and its work on this aspect of the topic was reflected in paras. 106 to 165 of its report (ibid.).

8/ Ibid., Forty-fifth session, Supplement No. 10 (A/45/10), chap. II, sect. C.

sessions. The Working Group would also draft concrete recommendations with regard to the various issues it would consider and analyse within the framework of its mandate. 9/

10. At the same session, the Working Group drew up a report to the Commission containing a summary with specific recommendations, an in extenso report examining and analysing a number of issues related to the possible establishment of an international criminal jurisdiction, as well as an appendix. 10/ The structure suggested in the Working Group's report consisted, in essence, of an international criminal court established by a statute in the form of a multilateral treaty agreed to by States parties and, in the first phase of its operations, at least, it should exercise jurisdiction only over private persons. Its jurisdiction should be limited to crimes of an international character defined in specified international treaties in force, including the crimes defined in the draft Code of Crimes against the Peace and Security of Mankind upon its adoption and entry into force, but not limited thereto. A State should be able to become a party to the statute without thereby becoming a party to the Code. The court would be a facility for States parties to its statute (and also, on defined terms, other States) which could be called into operation when and as soon as required and which, in the first phase of its operation, at least, should not have compulsory jurisdiction and would not be a standing full-time body. Furthermore, whatever the precise structure of the court or other mechanisms (which were also suggested and considered), it must guarantee due process, independence and impartiality in its procedures. 11/

11. Also at the same session, the Commission noted that, with the examination of the Special Rapporteur's ninth and tenth reports, as well as the report by the Working Group, it had concluded the task of analysis of "the question of establishing an international criminal court or other international criminal

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9/ Ibid., Forty-seventh session, Supplement No. 10 (A/47/10), para. 98.

10/ Ibid., para. 99 and annex.

11/ Ibid., para. 11 and para. 396 of the annex.

trial mechanism", entrusted to it by the General Assembly in 1989; 12/ that a structure along the lines suggested in the Working Group's report could be a workable system; that further work on the issue required a renewed mandate

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12/ Ibid., Forty-fifth session, Supplement No. 10 (A/45/10), paras. 93-158 and more particularly para. 100.

from the Assembly to draft a statute; and that it was now for the Assembly to decide whether the Commission should undertake the project for an international criminal jurisdiction, and on what basis. 13/

12. The General Assembly, in paragraphs 4, 5 and 6 of resolution 47/33 of 25 November 1992, took note with appreciation of chapter II of the report of the International Law Commission (A/47/10), entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; invited States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; and requested the Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international crimir court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

13. At its forty-fifth session, the Commission had before it the Special Rapporteur's eleventh report on the topic (A/CN.4/449 and Corr.1 (English only)), which was entirely devoted to the question of the establishment of an international criminal jurisdiction. The Commission also had before it in document A/CN.4/448 and Add.1 the comments and observations submitted by Governments, pursuant to the request formulated by the Commission at its forty-third session, on the draft Code of Crimes against the Peace and Security of Mankind, adopted on first reading at that session; 14/ and, in document A/CN.4/452 and Add.1 and 2, the comments submitted by Governments on

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13/ Ibid., Forty-seventh session, Supplement No. 10 (A/47/10) paras. 11 and 104.

14/ See para. 7 above.

the report of the Working Group on the question of an international criminal jurisdiction, 15/ further to the invitation contained in paragraph 5 of General Assembly resolution 47/33.

14. After considering the Special Rapporteur's report, the Commission decided to reconvene the Working Group it had established at the previous session, and further decided that the name of the Working Group should thenceforth be "Working Group on a draft statute for an international criminal court". The mandate given by the Commission to the Working Group was as provided in paragraphs 4, 5 and 6 of General Assembly resolution 47/33 of 25 November 1992. 16/

15. The Working Group referred to in the preceding paragraph submitted a report which was annexed to the report of the Commission. 17/

16. The Commission considered that the report of the Working Group represented a substantial advance over that of the 1992 Working Group on the same topic presented to the forty-seventh session of the General Assembly. 18/ The new report placed the emphasis on the elaboration of a comprehensive and systematic set of draft articles with brief commentaries thereto. Though the Commission was not able to examine the draft articles in detail at the forty-fifth session and to proceed with their adoption, it felt that, in principle, the proposed draft articles provided a basis for examination by the General Assembly at its forty-eighth session. 19/

17. The Commission stated that it would welcome comments by the General Assembly and Member States on the specific questions referred to in the commentaries to the various articles, as well as on the draft articles as a whole. It furthermore decided that the draft articles should be transmitted, through the Secretary-General, to Governments with a request that their comments be submitted

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15/ See. paras. 9-10 above.

16/ See Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10), paras. 96-97.

17/ Ibid., annex.

18/ Ibid., A/47/10, paras. 339-557.

19/ Ibid., A/48/10, para. 99.

to the Secretary-General by 15 February 1994. Those comments were necessary to provide guidance for the subsequent work of the Commission with a view to completing the elaboration of the draft statute at the forty-sixth session of the Commission in 1994, as contemplated in its plan of work. 20/

18. The General Assembly, in paragraphs 4, 5, 6 and 8 of resolution 48/31 of 4 December 1993 took note with appreciation of chapter II of the report of the International Law Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of a draft statute for an international criminal court; invited States to submit to the Secretary-General by 15 February 1994, as requested by the International Law Commission, written comments on the draft articles proposed by the Working Group on a draft statute for an international criminal court; requested the International Law Commission to continue its work as a matter of priority on this question with a view to elaborating a draft statute, if possible at its forty-sixth session in 1994, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States; and requested the Commission to resume at its forty-sixth session the consideration of the draft Code of Crimes against the Peace and Security of Mankind.

19. Pursuant to the resolution referred to in the preceding paragraph, the section of the present report dealing with the consideration of the topic at the present session will be divided into two subsections, namely:

I. Draft statute for an international criminal court;

II. Draft Code of Crimes against the Peace and Security of Mankind.

B. Consideration of the topic at the present session

I. Draft statute for an international criminal court

1. Consideration of the report of the Working Group established at the forty-fifth session

20. The Commission, at its present session, had before it the report of the Working Group on a draft statute for an international criminal court annexed to

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20/ Ibid., para. 100.

the report of the Commission on the work of its previous session (1993); 21/ the comments by Governments on the report of the Working Group on a draft statute for an international criminal court; 22/ and chapter B of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session on the report of the International Law Commission on the work of its forty-fifth session, prepared by the Secretariat. 23/

21. The Commission considered the report of the Working Group on a draft statute for an international criminal court annexed to the report on the work of its previous session (1993) 24/ at its 2329th to 2334th meetings, held from 3 to 9 May 1994.

22. A summary of the discussion in plenary session is given below.

General observations

23. While some members noted that, notwithstanding certain criticisms, the Commission's work had been well received by Governments, as indicated in the Sixth Committee debate and in the written comments, other members drew attention to the remaining obstacles to be overcome in order to complete the draft statute. There were various comments concerning the need to reconcile the expeditious completion of the draft statute, given its priority, with the care required to draft an instrument that would be generally acceptable to States and provide for the establishment of a viable and effective institution. Attention was drawn to the responsibility of the Commission, as an expert body, to give careful consideration in its continuing work on the statute to the views expressed by Governments, notwithstanding the sense of urgency. The opinion was expressed that it would be preferable to take more time, if necessary, to draft an instrument for a better, more useful and permanent institution bearing in mind the unlikelihood that the court would be established by States upon receipt of the draft statute by the General Assembly.

21/ Ibid., annex.

22/ Document A/CN.4/458 and Add.1-7.

23/ Document A/CN.4/457.

24/ See note 21 above.

24. While the priority assigned to the statute was considered to be sufficiently flexible to envision the completion of the work at this session or the next, it was generally agreed that the Commission should endeavour to complete the statute at the present session, provided this could be done without prejudicing the quality of its work. It was hoped that the Working Group would complete its task in time to enable the Commission to consider the

definitive draft statute before the end of the session and forward it with comments to the General Assembly, thus proving its ability to meet the international community's expectations.

25. There were various comments regarding the general approach to be taken by the Commission as it continued its work on the draft statute, with some members drawing attention to the continuing relevance of the principles that had guided the Commission's work and the instruments relating to the ad hoc Tribunal, other members calling for a more ambitious approach and still other members advising a more cautious step-by-step approach. In response to the suggestion that the Commission's work on the draft should be assessed in relation to the general principles that had provided the basis for the Commission's work to date, the view was expressed that not all of those principles had been free from challenge, as indicated by the differing views concerning the means by which the court should be established. While some members felt that the statute and rules of the ad hoc Tribunal should receive particular attention in addressing similar issues in relation to a permanent court, other members cautioned against placing too much emphasis on those instruments in the light of the essential differences between the two institutions.

26. As regards the question of whether the Commission should be more ambitious or more cautious in its approach, the members who favoured the former approach felt that the present draft was not sufficiently internationalist or universalist in its conception of the court, that it gave too much prominence to inter-State relations rather than a direct relationship between the individual and the international community, that its reliance on the traditional treaty approach might delay the establishment of the court, and that a more cautious approach would not sufficiently take into account the need for new mechanisms to address the recurring problem of ethnic violence in internal as well as international armed conflicts. Those who favoured the latter approach expressed the view that an instrument providing for an international criminal jurisdiction must take into account current international realities, including the need to ensure coordination with the existing system of national jurisdiction and international cooperation, that the establishment and effectiveness of the court required the broad acceptance of the statute by States which might require limiting its scope,

that the political aspects of the topic required a realistic approach in which those were left to the decision of States, and that the preparation of the draft statute was, anyway, an unprecedented exercise in creative legislation for the Commission, one that needed to be tempered by a strong sense of practicality.

Nature of the court

27. As regards article 4, while some members felt that the provision struck the right balance in providing for a permanent court that would sit when required to consider a case submitted to it, other members believed that this approach fell short of the task entrusted to the Commission in terms of preparing a statute for a permanent court with the necessary objectivity to try individuals accused of committing serious crimes. Still other members considered that it was for States to decide between the more practical solution of a non-standing permanent body or the more desirable alternative of a full-time organ from the point of criminal justice. It was suggested that the statute could combine the two approaches by providing for the present realistic and pragmatic arrangement, while at the same time envisaging the possibility of the court remaining permanently in session in the long term as a way of encouraging uniformity and further development of the law.

28. There were different views as to whether the nature of the court in terms of its relationship to national courts was adequately addressed in the present draft. Some envisaged the court as a facility for States that would supplement rather than supersede national jurisdiction; others envisaged it as an option for prosecution when the States concerned were unwilling or unable to do so, subject to the necessary safeguards against misuse of the court for political purposes. Still other members suggested that it might be appropriate to provide the court with limited inherent jurisdiction for a core of the most serious crimes. The view was expressed that further consideration should be given to existing treaty obligations to try or extradite persons accused of serious crimes, the absence of an implied waiver of national court jurisdiction by virtue of the establishment of the court, the residual nature of the court's jurisdiction as an additional element to the existing regime based on the options of trial, extradition or referral to the court, as well as the possibility of advisory jurisdiction to assist national courts in the interpretation of the relevant treaties, as in the

case of the Inter-American Court of Human Rights. There were also suggestions that the court should have discretion to decline to exercise its jurisdiction if the case was not of sufficient gravity or could be adequately handled by a national court. This suggestion was explained in terms of ensuring that the court would deal solely with the most serious crimes, not encroach on the functions of national courts, and that it would adapt its caseload to the resources available. In this context, attention was drawn to the experience of the European Court of Human Rights.

Method of establishing the court

29. As to the method of establishing the court, some members favoured an amendment to the United Nations Charter, while others favoured the conclusion of a treaty. A view was also expressed in favour of the adoption of a resolution by the General Assembly and/or the Security Council. While recognizing the practical difficulties of the first approach, some members were not prepared to rule out the possibility of a Charter amendment which would make the statute an integral part of the Charter, like the Statute of the International Court of Justice, with binding effect on all Member States when the requirements for its entry into force had been met. Those who preferred the second approach believed that a treaty would provide a firm legal foundation for the judgements delivered against the perpetrators of international crimes, enable States to decide whether or not to accept the statute and the jurisdiction of the court, particularly in view of the sensitive issue of national criminal jurisdiction, and avoid the practical difficulties of amending the Charter as well as the possible challenges to the legitimacy of a body established by resolution. The view was expressed that the treaty approach would require ensuring that the statute was widely accepted by States before its entry into force and also addressing the role of States parties in greater detail in the statute. In favour of the third approach, the need was stressed for ensuring the international or universal character of the court as a judicial organ of the international community rather than of a limited group of States parties, as well as the desirability of avoiding the delays in establishing the court that might result from the adoption of other approaches. The view was also expressed that the method of establishing a court, which would have implications in terms of its relationship to the United

Nations, was a political question to be decided by States, and that the Statute and commentary should both reflect the various possibilities.

30. There were different views as to whether a permanent court could be established as a subsidiary organ of the General Assembly or the Security Council or possibly as a joint subsidiary organ in view of their respective areas of competence. As regards the General Assembly, some members pointed out that the court could be established as a subsidiary organ under Article 22 of the United Nations Charter, its authority to establish a judicial organ having been confirmed by the International Court of Justice in its advisory opinion of 13 July 1954. However, other members questioned whether such a resolution of a recommendatory nature would provide a sound legal basis for the establishment of a criminal court, and in particular for its exercise of powers against individuals, and whether such an institution could be viewed as a subsidiary organ performing the functions entrusted to the General Assembly under the Charter. It was suggested that the General Assembly could adopt a resolution recommending the adoption of the statute of the Court as a treaty by States, to avoid any uncertainties concerning the legal effect of the resolution and any jurisdictional questions with respect to a State that had not voted in favour of the resolution. There was a further suggestion that the court could be established as both a treaty body and a subsidiary organ of the Security Council by means of concurrent resolutions of the Security Council and the General Assembly later submitted to States for ratification, with the Security Council having recourse to the court in response to Chapter VII situations before the entry into force of the instrument. However, other members distinguished between the authority of the Security Council to establish an ad hoc tribunal in response to a particular situation under Chapter VII of the Charter and the authority to establish a permanent institution with general powers and competence. Chapter VII of the Charter only envisaged action with respect to a particular situation.

Relationship to the United Nations

31. There was general agreement on the importance of establishing a close relationship between the United Nations and the court to ensure its international character and its moral authority. However, there were different views as to the appropriate means for achieving this end which were closely related to the

question of the method of establishing the court. While some members preferred the first alternative in article 2 as a means of ensuring that perpetrators of serious crimes of international concern would be prosecuted on behalf of the international community rather than by a group of

States Parties, other members felt that the second alternative offered a more pragmatic and realistic approach in view of the difficulties involved in amending the Charter.

32. While some members suggested that the character of the court as an institution of the international community could also be achieved by means of its establishment by a resolution of the General Assembly or the Security Council, other members questioned the establishment of a permanent judicial body by either the General Assembly or the Security Council because of the political character of those organs. It was suggested that further consideration should be given to the possibility of bringing the court into relationship with the United Nations by means of a special agreement.

33. The view was expressed that the relationship between the proposed court and the United Nations should be determined as a preliminary matter since this would have implications for a number of unresolved issues, such as the financing of the tribunal and the recruitment of its personnel. However, it was also suggested that the Commission's primary task was to produce a defensible structure for a court and that the issue of its relationship with the United Nations could be resolved at a later stage on the basis of various models of relationship with the United Nations.

Law to be applied by the court

34. The view was expressed that the relationship between the substantive law to be applied by the court and the procedural law represented by the statute had received insufficient attention. The problem of substantive law should not be confused with the procedural law currently embodied in the statute, and the question of determining the applicable law required consideration of substantive law which could not be adequately addressed in the statute because of the continuing vagueness of the rules of substantive law to be applied. Some members felt that the problems of applicable law and subject matter jurisdiction could be resolved by the completion of the Code and therefore suggested that work on this project should be accelerated. However, other members believed that the court should apply existing conventions and the relevant provisions of national law adopted pursuant to those conventions, as envisioned in the present draft statute, at least in the initial stage of its work. It was suggested that the

statute should be drafted in such a way as not to foreclose the future application of the Code.

35. Some members attributed particular importance to the applicability of national law, not only in instances where a treaty did not define a crime with the necessary precision, but also with respect to rules of evidence and penalties. Other members attributed greater importance to the application of customary law and jus cogens, particularly in the light of the Nürnberg precedent. It was pointed out, however, that in the event of conflict international law would prevail over national law, and that the nullum crimen principle was itself a rule of international law.

Jurisdiction

Personal jurisdiction

36. As regards personal jurisdiction, attention was drawn to the Nürnberg Judgment affirming that crimes against the law of nations were committed by men, not by abstract entities. The remark was made that while the difficulty of bringing the perpetrators to justice should not be underestimated, it was important that perpetrators of crimes should be aware of this eventuality. The view was expressed that the present State consent requirements for personal jurisdiction were too complex and did not sufficiently take into account other extradition obligations.

Subject matter jurisdiction

37. There were several remarks concerning the complexity of the subject matter jurisdiction provisions, the need to simplify those provisions to make them more comprehensible and to distinguish between subject matter jurisdiction and the conferral of jurisdiction.

38. There were various suggestions for modifying the list of treaties contained in article 22, including narrowing the list to encompass widely accepted multilateral conventions dealing with serious crimes of concern to all States; expanding it to include other treaties, such as the Convention against Torture; and adding a provision to facilitate the addition of treaties that may be concluded or enter into force in the future. Some questions were raised as to the logic and the usefulness of maintaining the distinction drawn between the two categories of treaties and whether the jurisdictional criterion of exceptionally

serious violations should not apply to all of the conventions. It was noted that the final decision concerning the list of treaties was a matter to be decided by States, possibly at a future diplomatic conference.

39. As regards crimes under general international law, some members considered it important to fill the void when the relevant treaties could not be invoked for reasons of non-ratification or when the crimes were not defined by treaty, notably aggression and crimes against humanity. Other members expressed concern regarding the vagueness or ambiguity of the reference to crimes under international law, and doubted whether customary law defined the crimes with the necessary precision. It was suggested that greater clarity could be achieved by defining or at least listing the crimes to be included within this category. In this regard, different views were expressed as to whether the definition of aggression should be limited to wars of aggression or should also extend to a single act of aggression; some members questioning the meaningfulness of the distinction.

State acceptance of jurisdiction

40. As regards State acceptance of jurisdiction, some members who favoured the opting in approach emphasized the importance of the voluntary acceptance of the jurisdiction of the court, distinguishing acceptance of the statute of the court from acceptance of its jurisdiction, the dependence of the court on the cooperation of States, and the need to limit the jurisdiction of the court to situations in which national courts were unable or unwilling to exercise jurisdiction. Those who favoured the opting out approach questioned the value of becoming a party to the statute without accepting the jurisdiction of the court and warned against creating an ineffective institution as a result of excessive restrictions on its jurisdiction. It was suggested that the statute should envision some exceptions to the optional nature of the acceptance of jurisdiction with respect to a limited number of particularly serious crimes, such as genocide.

Election of the judges

41. There was general agreement that the term of office for judges envisioned in the present draft was too long and should be reduced to a shorter period. The view was expressed that the qualifications of judges required further

consideration to ensure the necessary competence and experience in the respective chambers. It was also suggested that the election of judges should take into account the need to ensure equitable geographical representation reflecting the main legal systems and that there should be some limitation on the disqualification of judges by the accused to avoid abuse.

Structure of the court

42. There were different views as to whether the term "Tribunal" should be used to refer to the overarching structure of the court, with some members noting its historical antecedents institutions and others finding it confusing or misleading.

Submission of cases to the court

43. As regards the submission of cases to the court by States, some members felt that this should be limited to States parties to encourage wide adherence to the statute, other members felt that permitting any State or the Prosecutor to refer cases of serious crimes would increase the likelihood of prosecution, and still other members considered it appropriate to permit any State to refer cases involving lesser crimes by agreement.

44. There was general agreement that the powers of the Security Council were determined by the United Nations Charter and could be neither restricted nor expanded by the statute. On this basis, many members thought that it would be appropriate for the Council to refer situations rather than cases against particular individuals to the court when the requirements of Chapter VII were met. Attention was drawn to the distinction between the referral of a situation by the Security Council and the independent investigation to be conducted by the Procuracy. This approach was considered by some to be too bold in not expressly limiting Security Council action to Chapter VII situations and too timid in not permitting the Security Council to request the prosecution of particular persons when those requirements were met. There were some concerns regarding respect for the principles of non-discrimination and equal justice as a consequence of the veto.

45. There were different views as to whether the General Assembly should also be able to refer cases to the court or at least draw its attention to certain situations. Those who favoured conferring such a role on the General Assembly drew attention to its status as a primary organ of the United Nations, its character as the most representative body of the international community, its primary competence regarding human rights as well as its residual competence regarding international peace and security, and the

possibility of inaction by the Security Council as a result of the veto. However, other members drew a distinction between the Security Council and the

General Assembly in terms of the legal effect of their decisions under the Charter and questioned whether the necessary legal consequences of the referral of a matter to the court could flow from a recommendation.

State consent requirements for jurisdiction

46. There were different views as to the requirements of acceptance by States for instituting proceedings, with some members emphasizing the importance of obtaining the consent of the custodial State to ensure the presence of the accused and the territorial State to facilitate the investigation and collection of evidence, and other members emphasizing that States should not be able to interfere with the trial of persons who happened to be on their territory or their nationals with a view to preventing the court from functioning and thereby providing impunity. Attention was drawn to the possibility of Security Council action providing a substitute for the State consent requirements. It was also suggested that the court should be able to exercise some inherent jurisdiction with respect to the most serious crimes, such as genocide, which would not require State consent.

47. While some members attached importance to a Security Council determination of aggression as a precondition to the exercise of jurisdiction by the court, other members suggested that the implications of requiring such a determination required further consideration. The view was expressed that it might be useful to envisage a broader role for the Security Council in the light of its involvement in a multiplicity of conflicts and situations around the world as well as the risk of mischievous or harassment-type litigation. In the absence of Security Council action, it was suggested that the procuracy might be given the right to notify the Security Council of the charges of aggression. The remark was made that an individual charged with aggression should be permitted to prove that the State policy constituted legitimate self-defence.

Prosecuting authority

48. There were a number of suggestions regarding the Procuracy, including entrusting the powers to a collegial body rather than an individual, enlarging the Procuracy to ensure the proper administration of justice, and providing greater respect for the independence of the prosecutor in the removal procedures.

The conferral of investigative and prosecutorial powers on a single entity also gave rise to some concern.

Handing over of an accused person to the court

49. Attention was drawn to a number of issues which required further consideration, including the relationship between the regime to be established and existing extradition or status of forces agreements, whether surrendering a person to the court would constitute compliance with extradition obligations, whether the custodial State should have the option of granting an extradition request rather than handing the person over to the court, whether the requested State should have any discretion concerning the surrender of the accused to the court, and whether a State engaged in an investigation of the crime should be allowed to delay handing over the person. However, there were some concerns about creating procedural obstacles that would enable a State to prevent the court from prosecuting persons for crimes of international concern that offended the conscience of mankind.

Trial proceedings

50. As regards trials in absentia, many members expressed the view that such trials were not precluded by the International Covenant on Civil and Political Rights, and expressed satisfaction with the present draft in permitting the court to function notwithstanding the deliberate absence of the accused. On the other hand, others characterized trials in absentia as contrary to important judicial guarantees and questioned whether a statute envisaging such trials would be broadly acceptable to States. It was suggested that further consideration should be given to the policy question of permitting such trials, to the need to provide appropriate safeguards for the rights of the accused, and to whether substantially the same results could be achieved by other means, as in the case of the ad hoc Tribunal.

51. As regards the non bis in idem principle, while some members drew attention to the relevant provisions in the Statute of the ad hoc Tribunal, other members expressed concern about the court reviewing the decisions of national courts.

52. With regard to the judgment of the trial chamber, there were different views as to whether dissenting or separate opinions should be permitted in the context of a criminal court.

Penalties

53. There was a suggestion that it may be necessary to give the court discretion to determine the applicable law with respect to penalties which were not provided for in the Code or the relevant treaties. However, the view was expressed that reliance on national law provisions could only serve as a temporary expedient since such an arrangement could result in inconsistencies in the application of penalties by the court which would be incompatible with the nature of the court and inconsistent with the principle of judicial justice. There was a further suggestion to delete the provision concerning fines or to address this question in the context of miscellaneous or budgetary matters.

Rules of Procedure

54. There was general agreement that the statute should contain the essential procedural and evidentiary rules, particularly as those rules related to the rights of the accused and the notion of a fair trial, with the more detailed provisions to be worked out at a later stage. While some members favoured the elaboration of the rules by the judges, other members preferred appointing a group of experts to perform the task to enable States to consider the content of the rules in assessing the statute. The view was expressed that there should be some mechanism providing for the approval of the rules by the States parties to the statute.

Financing the Tribunal

55. As regards the financing of the tribunal, attention was drawn to the need to consider the financial and other resources required for an institution like the tribunal, the implications that the method of establishment of the court would have on its financing, and the importance of ensuring the financial viability of the tribunal.

2. Re-establishment of the Working Group on a draft statute for an international criminal court

56. The Commission at its 2331st and 2332nd meetings held on 5 May 1994 decided to reconvene the Working Group on a draft statute for an international criminal court which it had established at its previous session.

57. The mandate given by the Commission to the Working Group was in accordance with paragraphs 4, 5 and 6 of General Assembly resolution 48/31 of 9 December 1993.

3. Outcome of the work carried out by the Working Group on a draft statute for an international criminal court

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